Supreme Court, U.S.
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No. 97-1934

In The

Supreme Court of the United States

October Term, 1997

ROBERT H. BRIENT, JR.,

Petitioner,

v.

PETRO PSC, LP, a Delaware Limited Partnership,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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8 pp

QUESTION PRESENTED

Whether the decision of the Court of Appeals is consistent with Tennessee law on the issue of duty being a required element in a premises liability action?

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STATEMENT OF THE CASE

Petitioner's statement of the case sets out an incomplete and out-of-context view of the facts relied upon by the Court of Appeals in deciding this case. As noted several times in the opinion of the Court of Appeals, the court was particularly persuaded by the undisputed fact that Mr. Brient had full knowledge and awareness of the condition at issue in this case. The condition at issue was a two level parking lot separated by a retaining wall. It was undisputed that the area was well lighted. It was also undisputed that Mr. Brient was aware of the two levels of the parking lot as well as the retaining wall.

Furthermore, the petition states at page four that the jury verdict was "lower than the stipulated medical damages alone." To the contrary, there was a very sharp dispute about damages allegedly sustained by Mr. Brient. One of the petitioner's doctors testified that Mr. Brient did not need certain therapy requested by Mr. Brient himself. Also, contrary to Mr. Brient's testimony that he was so disabled he could not even tie his own shoes, opposing testimony by a private investigator apparently convinced the jury that Mr. Brient's damages were much less than he claimed.

At page four of the petition Mr. Brient states that the Court of Appeals held that "Mr. Brient was not entitled to a jury trial." Obviously, Mr. Brient received a jury trial. The Court of Appeals held that Petro was entitled to judgment as a matter of law because Mr. Brient did not establish the duty element of negligence.

At page five of the petition Mr. Brient notes that he filed a second motion to reconsider the decision of the

Court of Appeals after the *Coln v. City of Savannah* case was decided by the Tennessee Supreme Court. (The *Coln* decision contained as Appendix B in the petition is the sole authority relied upon by Mr. Brient in his petition.) At the time Mr. Brient's petition was submitted to this Court such second motion to reconsider was still pending before the Court of Appeals. On June 1, 1998, the Court of Appeals denied Mr. Brient's second motion to reconsider based upon the *Coln* case. Such order is included as Appendix A with this brief of Petro in opposition.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for a grant of a writ of certiorari in this case. None of the reasons cited in Supreme Court Rule 10, indicating the character of the reasons the Court considers, is present in this case. The petitioner contends that the Court of Appeals has decided this case in conflict with a decision of the Tennessee Supreme Court. That is not even one of the reasons cited in Supreme Court Rule 10 since this matter does not involve a federal question. Even more importantly, the decision of the Court of Appeals is not in conflict with a decision of the Tennessee Supreme Court as contended by petitioner.

Mr. Brient's petition revolves simply around his contention that the decision of the Court of Appeals is in conflict with the decision of the Tennessee Supreme Court in the case of *Coln v. City of Savannah*. (Copy of *Coln* opinion included in Appendix to Mr. Brient's petition.)

However, analysis of the opinion in *Brient* and the opinion in *Coln* shows that the two cases are not in conflict.

In *Brient* the Court of Appeals held that Mr. Brient could not establish the duty element of negligence. (See opinion of Court of Appeals in *Brient*, reprinted at page A-10 of the Appendix to petition.) The Tennessee Supreme Court in *Coln* emphasizes that duty is still an essential element which must be established by a plaintiff in a premises liability action.

Perhaps the clearest way to see that the *Brient* opinion does not conflict with the *Coln* opinion is to look at an earlier Tennessee Supreme Court case which was heavily relied upon in the *Brient* opinion and cited with approval in the *Coln* opinion. That case is *Eaton v. McClain*, 891 S.W.2d 587 (Tenn. 1994). In *Eaton* the Tennessee Supreme Court held that the plaintiff failed to establish the required duty element of a negligence case. Therefore, the Tennessee Supreme Court held that the defendant was entitled to a directed verdict in *Eaton*. In *Coln* the Tennessee Supreme Court specifically stated that its analysis in that case was consistent with *Eaton*. (See *Coln*, reprinted beginning at B-1 in Appendix to petition, at B-24.)

Another way to demonstrate that the *Brient* opinion is not in conflict with the *Coln* opinion is in the recognition that the Court of Appeals in no way relied upon the opinion of the Tennessee Court of Appeals in the *Coln* case. Had the Court of Appeals relied upon the erroneous ruling of the lower court in *Coln*, only then might it be said that the *Brient* opinion would be in conflict with the Tennessee Supreme Court opinion in *Coln*. To the contrary, the ultimate judgment in the *Brient* case is wholly

consistent with the Tennessee Supreme Court cases of *Coln v. City of Savannah* and *Eaton v. McClain*.

As pointed out at page five of Mr. Brient's petition, Mr. Brient filed a second motion to reconsider this case in light of the *Coln* opinion. The Court of Appeals presumably agrees that its judgment in *Brient* is correct and is consistent with *Coln* since the court denied Mr. Brient's second motion.

CONCLUSION

For the reasons set forth above, the writ should be denied. Furthermore, the alternative relief sought by petitioner, that the case be remanded to the Court of Appeals, should be denied.

Respectfully submitted,

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APPENDIX

Case No: 96-6405: 96-6494

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

(Filed Jun. 1, 1998)

ROBERT H. BRIENT, JR.

Plaintiff-Appellant Cross-Appellee

v.

PETRO PSC, LP, a Delaware Limited Partnership

Defendant-Appellee Cross-Appellant

BEFORE: BOGGS, MOORE, AND FARRIS,* Circuit Judges.

Upon consideration of the appellant cross-appellee's motion to suspend rules and allow petition for rehearing, and for en banc consideration under extraordinary circumstances,

And further considering the appellee cross-appellant's response in opposition,

It is ORDERED that the motion be and it hereby is **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk